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No. 96-786

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA *ex rel.* ALNOOR VIRANI,

Petitioner,

vs.

HALL & PHILLIPS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARC MARMARO
Counsel of Record
ANDREW R. HUNTER
JEFFER, MANGELS, BUTLER
& MARMARO
Attorneys for Respondent
Real Party in Interest Hall & Phillips
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067-5010
(310) 203-8080

70387 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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STATEMENT OF THE CASE

Petitioner Alnoor Virani ("Virani") seeks review of a decision of the Court of Appeals for the Ninth Circuit which held, in a case arising under the False Claims Act, that an award of statutory attorneys' fees should be paid to the attorneys who earned the fees.[1]

In 1993, the United States District Court in Los Angeles granted the *qui tam* plaintiff's motion for attorneys' fees under the False Claims Act, 31 U.S.C. § 3730(d)(1), and awarded $316,500 as a reasonable, statutory attorneys' fee. (*See* Virani's Petition for a Writ of Certiorari ("Vir. Pet."), at App. 4). The motion was extensively litigated, requiring several successions of briefing and a lengthy oral argument. Hall & Phillips (or "HP"), counsel for *qui tam* plaintiff Virani, submitted 65 pages of detailed, contemporaneously prepared time records describing over two thousand hours of legal work performed by HP's attorneys and paralegals. (E.R. Tab 150, at 23-87).[2] Both the government and the court recognized the substantial contributions of HP to the successful settlement of the case, which required defendants to pay $4.25 million in civil damages and penalties to the United States for their fraudulent conduct.[3]

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1. The Ninth Circuit denied Virani's petition for rehearing and his suggestion for rehearing *en banc*. *See* Order Denying Petitions, August 21, 1996, attached hereto as Appendix A. Not a single judge on the Ninth Circuit requested a vote for *en banc* consideration. *Id.* at 2a.

2. "E.R." refers to the "Excerpts of Record" prepared and filed by Hall & Phillips in the Ninth Circuit Court of Appeals, and the "Tab" numbers correspond to the numbers on the district court's docket sheet.

3. Pursuant to 31 U.S.C. § 3730(d)(1), the government agreed to pay Virani 20% of the settlement proceeds, or $850,000. (*See* E.R. Tab 232, at

(Cont'd)

(*See* E.R. Tab 109, at 15; E.R. Tab 198, at 183-184; E.R. Tab 173, at 91).

The defendants opposed the motion for attorneys' fees, challenging both the reasonableness of the fees requested and the propriety of HP's fee agreements with Virani and Virani's former co-plaintiff Taxpayers Against Fraud ("TAF"). The court rejected each of the defendants' arguments, however, and granted the motion in full, without a single reduction. (E.R. Tabs 173 and 179).

Shortly after the attorneys' fee judgment was entered, at the defendants' request, the defendants and Hall & Phillips negotiated a settlement agreement whereby the defendants would pay the full amount of the attorneys' fee judgment over time and with interest. (E.R. Tab 198, at 158-59 and Exh. A). However, Virani refused to sign the settlement agreement, asserting that his signature was not necessary. (E.R. Tab 225, at 201-02). Later, Virani asserted that he *personally* was entitled to the entire amount of statutory attorneys' fees awarded by the court, as well as to the entire 20% of the government's settlement proceeds. Virani's position was a complete disavowal of both his retainer agreement with Hall & Phillips, in which he explicitly assigned the statutory fee award to Hall & Phillips, (E.R. Tab 196, at 142), and of his agreement with TAF, in which he agreed to share any payment he received from the proceeds of the case with TAF. (E.R. Tab 196, at 137).

Virani's primary argument was that Hall & Phillips had failed to inform him that the firm would receive a contingency

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(Cont'd)

220). Virani had previously agreed to share his award with his former co-plaintiff, Taxpayers Against Fraud. TAF, in turn, agreed to fund the expenses of the lawsuit and to pay a contingency fee to counsel. (E.R. Tab 196, at 137-38; E.R. Tab 228, at 212A).

fee payment from TAF, in addition to the award of statutory attorneys' fees from the defendants. However, substantial evidence demonstrated that Virani was fully informed regarding the terms of the fee agreements and had consented to those terms. (*See, e.g.*, E.R. Tab 196, at 136-147 (the fee agreements Virani signed); E.R. Tab 198, at 179-180 (letter from attorney John Phillips to Virani describing the contingency fee allocation); E.R. Tab 225, at 205 (letter from attorney Ann Carlson to Virani describing the contingency fee allocation); *see also* E.R. Tab 225, at 200-02, and E.R. Tab 198, at 159-160, and 175 (declarations by three HP attorneys affirming that Virani never questioned or complained about the fee arrangements until long after the case was successfully concluded)).

Virani rejected Hall & Phillips' efforts to resolve the dispute through the California State Bar's established arbitration system and instead urged the defendants to ask the federal district court to resolve his dispute with Hall & Phillips. (E.R. Tab 198, at 175-76; E.R. Tab 193, at 113-14). Thus, the defendants, who had not yet paid the attorneys' fee award, filed a motion with the district court seeking a decision as to whom the attorneys' fees should be paid. Ironically, although Virani now contends that the ultimate entitlement to the attorneys' fees should be resolved in a state forum, he not only rejected a state forum when offered by Hall & Phillips, he was responsible for this matter being decided by a federal court. Moreover, Virani is unlikely to ever submit himself to a state forum, since he apparently resides in Canada, is not a United States citizen, and may owe a substantial amount of taxes to the United States. (*See* E.R. Tab 233 at 228; ER Tab 225, at 202).

Also ironic is Virani's claim that he is entitled to receive and keep the award of statutory attorneys' fees, despite the fact that he knowingly and explicitly assigned the fees to HP. Virani does not challenge the fact that the fee award was based directly

on the hours legitimately worked by counsel, nor does he quarrel with the excellent result the firm achieved for him. Rather, his dispute is with the separate agreement between HP and TAF, whereby TAF agreed to pay a contingency fee to HP, out of TAF's share of the proceeds of the case. That dispute is not before this court, nor any court. (*See* Vir. Pet. at App. 25-27). The Ninth Circuit properly rejected Virani's attempt to use his dispute regarding the contingency fee as a basis for obtaining funds (*i.e.*, statutory attorneys' fees) that undisputedly belong to his attorneys.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision ordering payment of the attorneys' fee award to HP was based on settled law, and does not merit review by this Court.

First, the Ninth Circuit's interpretation of the False Claims Act was entirely consistent with the decisions of its sister circuits. In cases interpreting similar attorneys' fee provisions in the Civil Rights Act and the Truth in Lending Act, the circuit courts have uniformly held that attorneys' fee awards must be paid to counsel both to avoid a windfall to the litigant and to prevent the litigant's creditors from diverting the funds from their intended purpose. The two decisions cited by Virani as in conflict with this case — *United States ex rel. Taxpayers Against Fraud v. General Electric Company*, 41 F.3d 1032 (6th Cir. 1994) and *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Company*, 76 F.3d 114 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 56 (1996) — did not address the issue raised by this case and are therefore inapposite.

The Ninth Circuit's decision is also in harmony with the attorneys' fee decisions of this Court. In *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Court held that a civil rights plaintiff may

waive or negotiate his right to statutory attorneys' fees to achieve a desirable settlement. The Ninth Circuit's order directing payment of those fees to HP in no way impacts the ability of plaintiffs in future cases to waive or negotiate statutory fees. It merely addresses the question — not at issue in *Evans* — of who should receive a statutory award of attorneys' fees, once those fees are requested and awarded.[4]

None of the other Supreme Court cases cited by Virani reached the issue of whether a plaintiff is personally entitled to receive and keep amounts awarded as statutory attorneys' fees. However, each of those cases contained an explicit or implicit assumption that, once awarded, the fees would accrue to the attorneys who earned them.

On the other hand, Virani has failed to cite a single case — and Hall & Phillips knows of no case — holding that an individual litigant is personally entitled to amounts awarded as attorneys' fees, except, of course, where a plaintiff is being reimbursed for actual expenditures to counsel. There are no other circumstances under which an individual client is personally entitled to receive amounts designated as statutory attorneys' fees.

Finally, the facts of this case make it unattractive for review by the Supreme Court. Virani argues that the Ninth Circuit's ruling will interfere with the ability of a client and attorney to

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4. In this case, of course, Virani did not waive or negotiate the attorneys' fee claim. Instead, he explicitly assigned any award of statutory fees to his counsel, Hall & Phillips ("HP"), and he authorized HP to file a motion for statutory fees. The California district court considered the extensive time records submitted by the firm and awarded $316,500 as a reasonable attorneys' fee. As noted by Judge Thomas in his concurring opinion, Virani's assignment of the statutory fee award provides a second and independent basis for the result reached in this case. (*See* Vir. Pet., at App. 15-18).

enter into a fee agreement under which the client will receive part or all of the statutory attorneys' fee award. As noted above, however, applicable law makes clear that a client simply may not retain amounts designated by the court for payment of an attorneys' fee.[5] Moreover, in this case, Virani made a knowing, explicit assignment of the statutory fee award to HP. Despite this assignment, Virani has made clear that if he receives the fee award, he intends to keep the entire award, and will likely remove it from the United States, effectively preventing HP from ever litigating its entitlement to the award. In addition, despite HP's requests, Virani has refused to resolve his claims under the California State Bar's established system for resolving attorney-client disputes through arbitration. Thus, Virani requests an outcome — that this entire dispute be resolved in a state forum — that he has already explicitly disavowed, and that he has made clear he will avoid in the future.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT CORRECTLY INTERPRETED THE FALSE CLAIMS ACT'S STATUTORY ATTORNEYS' FEE PROVISION.

The False Claims Act provides that in a successful case, the *qui tam* plaintiff (or "relator") "shall . . . receive an amount *for* . . . reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(1) (emphasis added). In determining the proper amount of attorneys' fees, district courts must consider the *actual effort* expended by the attorneys in litigating the case, and

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5. Indeed, in the case of the False Claims Act, retention of such funds would violate the government's right to receive at least 70% of the proceeds of the case. *See United States ex rel. Gibeault v. Texas Instruments Corp.*, 25 F.3d 725 (9th Cir. 1994).

whether that effort was reasonable. If an amount thereby determined by the court to be a "reasonable attorneys' fee" is not used to compensate the attorneys, but is instead kept by the *qui tam* plaintiff, it simply is not an *attorneys' fee.*

Prior to the decision in this case, the Ninth Circuit recognized the basic point that amounts received by a relator in a False Claims Act case cannot, by definition, be "attorneys' fees" in *United States ex rel. Gibeault v. Texas Instruments Corp.*, 25 F.3d 725 (9th Cir. 1994). In *Gibeault*, the government objected to a settlement reached by the *qui tam* plaintiffs and the defendant which provided for the dismissal of the case with prejudice in exchange for the defendant's payment of $300,000 for the relators' attorneys' fees. The government's objection was based, in part, on its suspicion that the $300,000 might actually be a compensatory payment to the relators. The district court refused to consider the government's objections to the settlement because the government had declined to intervene in the suit. The Court of Appeals reversed, stating that, based on its review of the record,

> the government has not received any answer to its inquiry whether the qui tam plaintiff has or will *personally receive* any part of the $300,000 to be paid by Texas Instruments in settlement. Thus, the government has a genuine concern as to whether the amount *labelled attorney's fees actually represents in part a payment to the qui tam plaintiff.*

Id. at 728 (emphasis added).

On remand, the district court found that relators had personally received nearly half of the settlement proceeds and that, accordingly, that portion of the settlement could not be appropriately considered legal fees. In a later order, the district

court held the relators and their counsel jointly and severally liable to the government for 70% of the amounts personally received by relators. The Ninth Circuit recently upheld that order. *See* 1997 U.S. App. LEXIS 31 (Dec. 13, 1996).

The outcome in *Gibeault* derives directly from the unique structure of the False Claims Act. Under the Act, the relator is entitled to receive up to 30% of the *government's recovery* to reward the relator for coming forward with his or her knowledge of fraud. *See* 133 Congr. Rec. H9389 (Oct. 7, 1986) (Statement of Rep. Berman). The Act also provides that successful relators are entitled to an amount for reasonable expenses, attorneys' fees and costs. 31 U.S.C. §§ 3730(d)(1) and (2). These amounts are paid directly by the defendant, are compensatory in nature, and are not shared with the government. The attorneys' fees are designed to encourage attorneys to bring meritorious cases by compensating successful counsel for "all time reasonably spent." 133 Cong. Rec. H9389 (Oct. 7, 1986).

The Ninth Circuit's decision in *Gibeault* acknowledges that, under the Act, payments to the relator come in the form of the reward, calculated as a percentage of the government's recovery. Relators cannot, however, personally receive and keep "attorneys' fees" which, by definition, are fees *earned* by the attorneys employed by the relator. Indeed, a plaintiff is not even entitled to a fee award unless the fees awarded will go the attorney who earned them. *See Phillips v. General Servs. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) ("[T]o be 'incurred' within the meaning of a fee shifting statute, there must also be an express or implied agreement that the fee award will be paid over to the legal representative."). For the same reason, *pro se* litigants — even those who are themselves attorneys — are not entitled to receive statutory awards of attorneys' fees. *Kay v. Ehrler*, 499 U.S. 432 (1991). In *Kay*, the Supreme Court found that "Congress contemplated an attorney-client relationship as

the predicate for [a statutory fee] award." *Id.* at 436. Virani should not be able to obtain the statutory fees for himself — a result he could not have obtained had he appeared *pro se* — simply because he hired counsel.

Thus, the Ninth Circuit's decision in this case was appropriately based on the language and structure of the False Claims Act. In addition, the decision furthers the primary purposes underlying the fee-shifting statute. Those purposes are 1) to encourage the private bar to bring *qui tam* cases in the first place,[6] and 2) to encourage the private bar to substantially augment the legal resources of the federal government, which Congress found to be lacking.[7] The Act therefore was designed to incentivize attorneys to commit legal resources to worthwhile *qui tam* cases by guaranteeing private attorneys a reasonable fee, as well as recoupment of their costs and expenses, in successful cases. 31 U.S.C. § 3730(d)(1), (2).

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6. The Senate Judiciary Committee noted the need for a statutory attorneys' fee provision: "Unavailability of attorneys fees inhibits and precludes many private individuals, as well as their attorneys, from bringing civil fraud suits." S. Rep. No. 99-245, 99th Cong., 2d Sess. (1986), (hereinafter "S. Rep.") at 29.

7. *See* S. Rep., at 7 ("[P]erhaps the most serious problem plaguing effective enforcement [of the False Claims Act] is a lack of resources on the part of federal enforcement agencies."). Similarly, the legislative history of the Act, as recorded by Representative Berman in the House, states:

> The law we vote on today is intended to encourage a working partnership between both the Government and the qui tam plaintiff. The public will be well served by having more legal resources brought to bear against those who defraud the Government.

133 Cong. Rec., H9388 (Oct. 7, 1986) (Statement of Rep. Berman).

Contrary to Virani's assertion (Vir. Pet. at 19), Congress clearly intended that the attorneys' fees awarded under the Act would be used to compensate the attorneys who earned the fees. As Rep. Berman explained: "This Act now expressly provides for the reasonable attorneys' fees *to counsel* for the person initiating the action." 133 Cong. Rec. H9389 (Oct. 7, 1986) (emphasis added). Moreover, in determining what constitutes a "reasonable" fee, Congress indicated that courts should utilize a "marketplace rate" that reflects "competent *counsel's* expectations" in light of the many contingencies involved in a False Claims Act suit. *Id.* (emphasis added).

II.

THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEAL INTERPRETING STATUTORY ATTORNEYS' FEE PROVISIONS.

A. In Civil Rights Cases, The Circuit Courts Uniformly Hold That Attorneys' Fee Awards Should Be Paid To Counsel To Avoid A Windfall To Litigants.

In many civil rights cases, plaintiffs are represented free of charge by non-profit, public service organizations. The Supreme Court has recognized however, that an award of attorneys' fees in such a case is not precluded merely because the plaintiff is not obligated to pay his or her lawyers. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71, n. 9 (1980); *accord Evans v. Jeff D.*, 475 U.S. 717, 756, n. 9 (1986) ("[T]he fact that the fee award would benefit a legal services corporation [does not] justify a refusal to make an award.").

Although the Supreme Court has not explicitly addressed this issue, numerous Courts of Appeals have held that such a

fee award "should be made directly to the organization providing the services to ensure against a windfall to the litigant." *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974). *See also Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1970) (the court will assure "that the fees allowed are to reimburse and compensate for the legal services rendered and will not go the litigants, named or class"); *Hairston v. R & R Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975) ("To avoid any windfall . . . the grant of fees should go directly to the organization providing the services."); *Rodriguez v. Taylor*, 569 F.3d 1231, 1245 (3d Cir. 1977) (same).

The holding of *Brandenburger* and its progeny — that statutory attorneys' fees should be paid directly to counsel — has not been limited to cases where the legal work is performed by non-profit organizations or other firms with non-paying clients. In *Quesada v. Thomason*, 850 F.2d 537 (9th Cir. 1988), the Ninth Circuit held that a statutory fee award should not be reduced even thought it exceeds what the plaintiff's attorneys would have earned under a private fee agreement. The Court's decision made clear that, regardless of what the private fee agreement provided, the statutory fee award should be paid *to counsel* in full. *Id.* at 543. The Ninth Circuit then explained that "[o]f course, no real concern for windfalls to plaintiffs arises. Circuits permitting statutory awards in excess of private fee agreements *uniformly hold* that the higher statutory fee *should be used to compensate the attorney in full.*" *Id.* (emphasis added) (citations omitted).

A year after *Quesada*, the Supreme Court reached a similar holding — *i.e.*, that statutory fee awards should not be limited by private fee agreements — in *Blanchard v. Bergeron*, 489 U.S. 87 (1989). Although the Supreme Court did not directly state

that the fee award should accrue in full to counsel, that result was clearly implied.[8]

B. Truth In Lending Act Cases Emphasize The Distinction Between The Plaintiff's Right To Seek Attorneys' Fees In The First Instance, And The Attorney's Right To Receive The Fees, Once Awarded.

Like the False Claims Act, the Truth in Lending Act ("TILA") provides for a mandatory award of attorneys' fees to plaintiffs in successful cases. Interpretations of TILA's mandatory fee award have clearly elucidated the distinction between the successful plaintiff's right to seek an award of attorneys' fees in the first place, and the attorney's right to receive those fees, once they are determined and awarded by the court.

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8. As in *Quesada*, the defendant in *Blanchard* argued that refusing to limit the statutory fee to that set forth in the private contingency fee agreement would "result in a 'windfall' to attorneys." 489 U.S. at 96. The Supreme Court dismissed the defendant's concern, noting that

> the very nature of recovery under Sec. 1988 [of the Civil Rights Act] is designed to prevent any such "windfall." Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, *by definition*, will represent the *reasonable worth of the services rendered* in vindication of the plaintiff's civil rights claim.

Id. (emphasis added). Although unstated, the decision clearly assumes that the *attorney* will receive the amount awarded as reasonable attorneys' fees: since the amount awarded represents "the reasonable worth of the services rendered" *by the attorney*, the attorney receiving the payment will not receive a windfall. *See also id.* at 91 (citing Congress' intent that "*counsel* should be paid for . . . all time reasonably expended") (emphasis added) (internal quotations omitted).

For example, in *Plant v. Blazer Financial Services, Inc.*, 598 F.2d 1357 (5th Cir. 1979), a TILA defendant sought to set off amounts awarded on its counterclaim against the statutory attorneys' fees awarded to the plaintiff on her TILA claim. In order to resolve the dispute, the Fifth Circuit first had to determine whether the plaintiff — or her attorney — was ultimately entitled to receive the attorneys' fee award. The defendants in *Plant* argued that the plain language of the statute required the attorneys' fees to be paid directly to the plaintiff and the fees were therefore subject to set off. However, the Fifth Circuit explained that:

> Such an approach misstates the issue before the Court, places greater emphasis upon form than substance, and attaches to [the statutory language] an unintended significance. The issue with which the Court is concerned is *not whether plaintiff is nominally to receive the money but whether ultimately it is to go to her attorney* or to be credited toward defendant in repayment of plaintiff's debt.

Id. at 1366 (emphasis added).

The Court of Appeals concluded that since the *attorney* was entitled to the fee award, a set-off of the plaintiff's debt was not appropriate. *Id.* at 1365-66. *See also Freeman v. B & B Associates*, 790 F.2d 145, 149-150 (D.C. Cir. 1986) (holding that while an attorney may not pursue an independent cause of action for attorneys' fees under TILA, once a fee is awarded it "becomes in effect an asset of the attorney rather than the client").

Plant and *Freeman* are more closely on point in this case than any of the Supreme Court civil rights cases relied on by

Virani. In the civil rights cases, the parties did not raise, and the courts did not consider, the issue of who was ultimately entitled to receive the award of attorneys' fees. *See* discussion, *infra*, at 17. In *Plant*, however, the Fifth Circuit had to address the issue of ultimate entitlement to a statutory fee award — the precise issue raised by this case — in order to decide whether the attorneys' fees could be set off against the plaintiff's debt.

C. The Decision In This Case Is Not In Conflict With *Central States* Or *GE*.

Virani argues that the Ninth Circuit's decision in this case is in direct conflict with *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Company*, 76 F.3d 114 (7th Cir. 1996) and *United States ex rel. Taxpayers Against Fraud v. General Electric Company*, 41 F.3d 1032 (6th Cir. 1994). However, neither the Seventh Circuit nor the Sixth Circuit directly addressed the central issue in this case: whether awards of statutory attorneys' fees should be paid to the litigant or to the attorneys who earned the fees.

In *Central States*, the issue facing the Court of Appeals was how to calculate a "reasonable" attorneys' fee in a case where the plaintiff was an organization represented by its in-house counsel. The defendant contended that it should pay only the plaintiff's out of pocket expenses for in- house counsel, while the plaintiff sought compensation for the "market rate" plaintiff would have paid had it hired outside counsel to perform the same services. The court concluded that the market rate for comparable legal services was the appropriate measure of a reasonable fee. 76 F.3d at 117. The question of who should receive the fee award was not at issue in *Central States*. Thus, the Seventh Circuit's discussion of whether the prohibition against fee-splitting would be violated by a plaintiff's receipt of more than its actual expenses for staff counsel was merely

dicta. Moreover, the Ninth Circuit's reasoning in this case did not hinge on the concern that payment of attorneys' fees to a litigant would constitute fee-splitting. Accordingly, the Ninth Circuit's decision in this case does not conflict with *Central States.*

Similarly, the Ninth Circuit's decision does not conflict with *GE*, which was a direct appeal of an award of attorneys' fees. The Sixth Circuit simply did not address the issue of whether an award of statutory fees should be paid to the plaintiff rather than the plaintiff's attorney. Indeed, the Sixth Circuit had no cause to address this issue since the plaintiff in that case had assigned the statutory fees to his attorneys and did not contest his attorneys' right to receive the fees awarded by the court. 41 F.3d at 1036, 1048. Like the court in *Central States*, the court in *GE* was considering what constituted a "reasonable" attorneys' fee in that case. Before making such a determination, the Court of Appeals found that the district court needed to conduct further fact finding and resolve certain factual issues. *Id.* at 1044. In addition, the Sixth Circuit directed the district court to consider more fully the role TAF had played in that litigation. *Id.* However, the purpose of the additional fact finding was to determine (1) whether the fee award should be reduced, and (2) whether the division of the relators' share and contingency fees should be altered. *Id.* at 1044-45.

By contrast, in this case, Virani is not appealing the determination of what constitutes a "reasonable" attorneys' fee in this case, nor is he appealing a decision regarding the division of the relators' share or contingency fee.[9] He is simply appealing the Ninth Circuit's order directing payment of the attorneys'

9. Indeed, the district court determined that it lacked jurisdiction to hear Virani's claims regarding the relators' share and the attorneys' contingency fee. (*See* Vir. Pet., at App. 25-27). Virani did not appeal that ruling, nor has he sought resolution of his claims in any other forum.

fee award to the attorneys who earned them. Since the Sixth Circuit did not reach that issue, no conflict exists.

Virani complains, however, that there is a conflict because the Sixth Circuit requires a searching review of the fee agreements "when questions of ethical improprieties arise," while the Ninth Circuit allows attorneys to commit ethical violations without any such review. (Vir. Pet. at 26). However, the Ninth Circuit *did* consider the allegations that HP had acted improperly, based on the *extensive factual record* that was before that court, and concluded that, even if there were any ethical improprieties, they did not rise to the level of a conflict of interest, and did not affect the legitimacy of HP's fee award. (Vir. Pet. at App. 12-14). In *GE*, there was virtually no factual record regarding the fee arrangements, thus necessitating a remand. 41 F.3d at 1044.

Moreover, even *GE* made clear that, with the exception of TAF's portion of the attorneys' fee award,[10] none of the factual inquiries regarding HP's fee arrangements or the firm's relationship with TAF should have any impact on the attorneys' fees received by HP. Rather, those inquiries were relevant to "the division of the bounty [*i.e.*, the relators' share] and the contingency fees among the parties." *Id.* at 1045. In this case, the issues of the relators' share and the contingency fee were not before the Ninth Circuit.

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10. In this case, no fees were awarded to TAF, rendering that portion of the *GE* decision irrelevant.

III.

THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH SUPREME COURT AUTHORITY ON STATUTORY FEE AWARDS.

Contrary to Virani's assertion, the Court of Appeal's holding in this case is completely consistent with decisions by this Court interpreting the statutory fee provision of the Civil Rights Act. First, none of the cases cited by Virani reach the issue presented by this case. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717 (1986) (holding that plaintiff may negotiate or waive her right to attorneys' fees in order to settle the case); *Venegas v. Mitchell*, 495 U.S. 82 (1990) (holding that a civil rights plaintiff is bound by his contingency fee agreement even where that agreement results in a higher fee than that awarded by the court); *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (holding that a statutory fee award may not be limited by the plaintiff's contingency fee agreement); *Blum v. Stenson*, 465 U.S. 886 (1984) (holding that a "reasonable fee" must be calculated using prevailing market rates, even where plaintiff is represented by legal aid or other non-profit counsel).

Although none of these cases reaches the issue in this case, the decision of the Ninth Circuit is fully consistent with the reasoning underlying this Court's decisions. Indeed, each of the cases, as well as other Supreme Court cases regarding fee awards, contains the explicit or implicit assumption that, once requested and awarded, statutory fee awards will accrue to the attorneys who earned them.

For example, in *Evans*, although the plaintiff had *no agreement* to pay his Legal Aid counsel, 475 U.S. at 721, and despite the Court's holding that the plaintiff had the right to negotiate away the statutory fees, the Court noted that "any

award of costs or fees [were such an award to be made] would inure to the benefit of Idaho Legal Aid." *Id.* at 721, n.2. Directing payment of a statutory fee award to plaintiff's counsel does nothing to violate the principle of *Evans*. The plaintiff is still free to decide whether to seek an award of attorneys' fees in the first instance.[11] In this case, of course, Virani did not choose to waive or negotiate the statutory fees, he chose to assign them to Hall & Phillips and then, once they were awarded, sought to obtain the attorneys' fees for himself.

In addition, the Supreme Court often refers to Congress' intent that a "reasonable fee" should be one that is sufficient to attract competent counsel but that does not produce a windfall to the attorney. *See, e.g., Blum*, 465 U.S. at 897; *see also Blanchard*, 465 U.S. at 96 (since reasonable fee awards "by definition will represent the reasonable worth of the [lawyers'] services" attorneys will not receive a windfall). Underlying this legal standard is a clear assumption that the statutory fee will be paid to the attorney. *See* discussion, *supra*, at n. 8. *See also City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) ("[T]o ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to *compensate lawyers* for all time reasonably expended on a case.") (emphasis added); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("Where a plaintiff has obtained excellent results, *his attorney* should recover a fully compensatory fee"); *accord Blum*, 465 U.S. at 901.

Virani points to Judge Thomas' concurring opinion in this case, in which he concluded that the majority's interpretation

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11. Although Hall & Phillips assumes this is true *arguendo*, it may not be true in the False Claims Act context. In *Evans*, the Supreme Court noted that when Congress enacted section 1988, it "specifically rejected a mandatory fee-shifting provision." 475 U.S. at 732, n.22. In the False Claims Act, however, the fee-shifting provision *is* mandatory.

of the False Claims Act is inconsistent with Supreme Court authority in that it "interferes with the contractual relations between attorney and client." (Vir. Pet. at App. 17). Judge Thomas' conclusion, however, is based on the assumption that an attorney and client *could* agree that the client would personally receive part or all of a statutory fee award. Neither Judge Thomas nor Virani can point to a single case, state or federal, holding that an individual client's personal retention of amounts awarded as statutory attorneys' fees is permissible. Attorneys' fee awards are directly based on the reasonable hours spent litigating the case by counsel, and must therefore be directed to the attorneys who earn them.[12]

IV.

THE APPEALED DECISION DOES NOT INTERFERE WITH STATE AUTHORITY OVER FEE AGREEMENTS OR ATTORNEY CONDUCT.

The Ninth Circuit's decision that H&P was entitled to the award of statutory attorneys' fees did not depend on an interpretation of state law — it depended on the construction of a federal statute. However, the Court of Appeal's construction of that statute does not impinge on the state's authority over fee

12. Moreover, under Virani's and Judge Thomas' interpretation of *Venegas*, *Blum* and *Blanchard*, an attorney's right to receive statutory fees is based completely on the retainer agreement; the plaintiff must contractually agree to pay the fees to counsel before counsel has a right to receive them. If this were true, however, lawyers from Legal Aid or other non-profit firms that do not enter into such contracts would have no right to receive statutory fees, and any fees awarded would be retained by the plaintiff. The Supreme Court has held however, that Legal Aid attorneys should receive fees regardless of the lack of any agreement by their clients to pay them. *New York Gaslight Club, Inc.*, 447 U.S. at 70-71, n.9; *Evans*, 475 U.S. at 756, n.9. Thus, the attorneys' right to receive the fee award stems from the fee-shifting statute itself, not solely from contract.

agreements. As noted above, Virani has never been able to point to any state law that permits clients to keep for themselves monies awarded as statutory attorneys fees.[13] In fact, California law clearly indicates that when a court has awarded a reasonable attorneys' fee, "a direct award to the plaintiffs' attorney, rather than to the plaintiffs themselves" is entirely appropriate. *Serrano v. Unruh*, 32 Cal. 3d 621, 625 n.5, 186 Cal. Rptr. 754 (1982). More importantly, Virani's contract in this case explicitly assigned the award of statutory attorneys' fees to H&P and Virani has never challenged the validity of that aspect of the contract.

Nor did the appellate court interfere with the state's authority over attorney conduct. As discussed previously, Virani's dispute with HP is his contention that HP failed to inform him that it would receive a contingency fee from TAF in addition to the statutory fee. The substantial evidence presented to both the district court and the Court of Appeals clearly demonstrates the falsity of Virani's allegation. *See* discussion, *supra*, at 3. Nevertheless, Virani could have sued HP in state court over the contingency fee agreement. He deliberately chose not to pursue that course. In addition, the State Bar retains authority over the conduct of all attorneys practicing within California, including HP. Simply put, the Ninth Circuit's decision regarding the statutory attorneys' fee award in no way dilutes or impinges the right of the State to regulate attorneys and their fee agreements.

Finally, it should be noted that Virani has misstated the relevant law. An attorney asserting a state-created lien in a federal court action is not required to file a notice of lien or a separate proceeding. *See Venegas v. Skaggs*, 867 F.2d 527, 530 n.2 (9th Cir. 1989), *aff'd on other grounds, sub nom Venegas v. Mitchell*,

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13. Of course, if a client has paid his attorney on an ongoing basis, he would be entitled to repayment of his actual expenditures. The purpose of the Ninth Circuit's decision is to avoid a windfall to litigants, not to grant one to attorneys.

492 U.S. 82 (1990). Indeed, even under state law, formal notice of the lien is not required. *See Hansen v. Haywood*, 186 Cal. App. 3d 350, 358, 230 Cal. Rptr. 580, 585 (Cal. App. 1st Dist. 1986). In any event, all parties have long been on notice of HP's lien interest in the statutory fee award. Virani's citation to California law is a red herring.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARC MARMARO
Counsel of Record
ANDREW R. HUNTER
JEFFER, MANGELS, BUTLER
& MARMARO
Attorneys for Respondent
Real Party in Interest Hall & Phillips
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067-5010
(310) 203-8080

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 21, 1996

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56396

D.C. No. CV.-89-01302-WDK-Ex

UNITED STATES OF AMERICA ex rel. ALNOOR VIRANI,

Plaintiff-Appellee,

v.

JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; STEVEN LEWIS; ROBERT HOLTZMAN,

Defendants,

and

HALL & PHILLIPS,

Appellants.

No. 95-56456

D.C. No. CV.-89-01302-WDK-Ex

UNITED STATES OF AMERICA, EX REL. ALNOOR VIRANI,

Plaintiff-Appellee,

Appendix A

v.

STEVEN H. LEWIS; JERRY M. LEWIS TRUCK PARTS & EQUIPMENT, INC.; ROBERT HOLTZMAN,

Defendants-Appellants.

ORDER DENYING PETITIONS FOR REHEARING, REJECTING SUGGESTION FOR REHEARING EN BANC, AND DENYING MOTION TO CONSOLIDATE

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

The petition of defendants-appellants for rehearing is DENIED.

The panel has unanimously voted to deny the appellee's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration. The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appellee's motion to consolidate this case with *United States of America ex rel. Taxpayers Against Fraud v. Kirchoff*, No. 94-56482, is DENIED.